

Commonwealth of Massachusetts
Supreme Judicial Court

APPEALS COURT DOCKET No.: 2016-P-1372
TRIAL COURT DOCKET No.: 1521CR174

COMMONWEALTH OF MASSACHUSETTS,

Appellee

v.

MICHAL WOLFE

Defendant-Appellant

On Appeal from a Judgment on a Verdict in
the Marlborough Division of the
Middlesex County District Court for the
Commonwealth of Massachusetts

**APPELLANT'S APPLICATION FOR
DIRECT APPELLATE REVIEW**

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I. Request for Direct Appellate Review

Pursuant to Mass. R. App. Pro. 11, Michael Wolfe hereby requests Direct Appellate Review of the judgment and sentence that entered against him below.

II. Statement of Prior Proceedings

On February 13, 2015, Mr. Wolfe was arraigned for OUI-Liquor, Marked Lanes Violation, and Motor Vehicle Equipment Violation. M.G.L. c. 90, §§ 7, 24(1)(a)(1); c. 89, § 4a. After a mistrial on January 6-7, 2016,¹ on March 29 he was convicted of the OUI charge, found responsible for the Marked Lanes Violation, which was placed on file, and found not responsible on the Motor Vehicle Equipment charge. Add. 3-4.

Before the March 29 trial, the defendant's motions to exclude blood alcohol, field sobriety, and breathalyzer refusals and attempts was allowed. Add.5-8. After the trial, the judge gave a Downs instruction over the defendant's objection. T.125-27.

III. Short Statement of Facts Relevant to the Appeal

On February 13, 2015, Officer Pete Richardson of

¹ After the mistrial, the jury posed the following question: "Are we allowed to ask, 'Why there are no tests?' eg. Breathalyzer or blood tests?" The court responded with a Downs instruction. MT.I, 137-39; Add.9. Citations are as follows: 3/29/16 Trial, T.[_]; 1/6-7/16 Mistrial, MT.[_],[_]; Addendum, Add.[_].

the Marlborough Police Department was on routine patrol on Main Street in Marlborough when he spotted a Red Ford Explorer with its taillight out, which he decided to follow. T, 50, 52-53. Officer Richardson followed the Explorer for 5-10 minutes and observed it taking a left turn onto East Main Street, where it briefly crossed the yellow line to avoid a large snow bank that had piled up on the right side of the road. T, 53-54.

In making the left hand turn, the Explorer used the appropriate left-turn-only lane, used the appropriate directional. T, 74. Officer Richardson continued following the Explorer as it turned onto Stevens Street, again briefly crossing the yellow line. T.56. Officer Richardson continued to follow the Explorer for another mile, satisfied that it had not made any "particularly dangerous or unsafe" maneuvers justifying immediate intercession. He saw no swerving, speeding, or crossing the yellow line, despite the road having significant twists and turns. T.72-77.

Finally, Officer Richardson activated his lights, and the Explorer immediately decelerated, coming to a gradual stop without striking the curb. When the officer requested his license and registration, Mr. Wolfe retrieved them without difficulty. Despite the

other occupants of the car being rowdy and yelling, Mr. Wolfe treated the situation with appropriate seriousness, and answered the officer's questions about where he had been and whether he had consumed alcohol honestly; he had been at a restaurant and a club, and he had consumed a few beers. T.82-90. Officer Richardson testified that he observed indicia of consumption, made the arrest, and booked Mr. Wolfe at the station. Mr. Wolfe did not fall, was alert during the ride, and slept briefly at the station. T.95, 99.

IV. Statement Of Issues Of Law Raised By The Appeal

1. Whether Commonwealth v. Downs, 53 Mass. App. Ct. 195 (2001) was wrongly decided insofar as it allows an irrelevant issue to be interjected into deliberations over the defendant's objection; this is the only issue that was preserved, T.126-27;
2. Whether the inclusion of multiple types of testing in a Downs instruction that is followed by comments regarding a defendant not testifying was reversible error; and
3. Whether the prosecutor relying on facts not in evidence to bolster weak evidence of impairment was reversible error.

V. Brief Argument

a. Downs Was Wrongly Decided And Should Be Reversed

In Commonwealth v. Downs, 53 Mass. App. Ct. 195 (2001), the Appeals Court reasoned that "without some form of a limiting instruction concerning the breathalyzer, a jury very well could rely upon their

common knowledge and engage in . . . speculation," and held that "[i]t was, therefore, not incorrect for the trial judge to . . . instruct[the jury] that they were not to think about or otherwise consider the fact that no evidence was offered concerning the breathalyzer." Id. at 199. This holding should be revisited and overruled because the reasoning underlying it is flawed.

It is incorrect that, in the absence of a Downs instruction, an OUI jury are "without some form of a limiting instruction concerning the breathalyzer." Juries are uniformly instructed that they "are to decide what the facts are solely from the evidence admitted in this case, and not from suspicion or conjecture," Criminal Model Jury Instructions For Use In The District Court, § 2220 (2009); T.154. This instruction concerns all matters that do not come into evidence.

The virtue of such a general instruction is that it makes the apposite point without focusing the jury on the evidence whose absence invites speculation. Ample research indicates that a limiting instruction focused on the matter to be disregarded is very likely to invite improper speculation on that very matter.²

² See e.g., Joel D. Lieberman & Jamie Arndt, *Understanding The Limits Of Limiting Instructions*:

Moreover, the jury are already instructed not to speculate on matters not in evidence, so Downs itself is a derogation from the "presum[ption] that a jury understands and follows limiting instructions." Downs, 53 Mass. App. Ct. 198. Because the law trusts juries to follow limiting instructions, courts should not comment on a matter not in evidence, over a defendant's objection, unless and until the jury inform the court that they are struggling with that matter's absence, as the jury did in Mr. Wolfe's first trial.

The admission of "refusal evidence violate[s] the

Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence, 6 PSYCHOLOGY, PUBLIC POLICY, AND LAW 677, 678, 686 (2000) ("[A] large body of research indicates that jurors have great difficulty ignoring information once they have become aware of it. . . . With few exceptions, empirical research has repeatedly demonstrated that . . . limiting instructions are unsuccessful at controlling jurors' cognitive processes."); John Rafael Perez, *Managing Fear-Based Derogation in Murder Trials*, 43 NOTRE DAME JOURNAL OF LEGISLATION 1, 29 (2016) ("These common practices reveal an implicit understanding by litigators that judicial instructions and clarifications may not serve as a complete panacea for the influence of improper evidence."); Adam H. Kurland, *Providing a Federal Criminal Defendant With a Unilateral Right to a Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. DAVIS L. REV. 309, 337 (1993) ("[E]ven with a limiting instruction, the jury will likely use the evidence in a manner that the law does not sanction and be swayed by the evidence to a greater degree than would be the case if they only considered the evidence of the actual events").

privilege against self-incrimination." Opinion of the Justices to the Senate, 412 Mass. 1201, 1211 (1992). Over objection, the jury were instructed specifically regarding tests that Mr. Wolfe had refused. Such error requires reversal unless harmless beyond a reasonable doubt. Commonwealth v. Grady, 474 Mass. 715, 716 (2016).

The Downs instruction in this case was demonstrably prejudicial. The jury in the defendant's mistrial received virtually identical evidence as the second jury, with defense counsel twice refreshing prosecution witnesses to ensure consistency. T.68, 86-87. The difference is that the jury that did not convict Mr. Wolfe also did not hear any specific information about a breathalyzer test until they asked about it. (MT. 138-39).³ Driving home this prejudice is the fact that, as discussed infra at Section V.(b.)(i.), the prosecution's evidence of intoxication was very slight.

The constitutional dimension of the Downs instructions also heightens the importance of allowing

³ Another difference is that the jury that did not convict Mr. Wolfe also did not hear closing argument claiming, without evidentiary support, that Mr. Wolfe filled the police station with the odor of alcohol, and could not turn on his own cell phone, which goes to show how prejudicial the error discussed infra at V. (c.) was in Mr. Wolfe's case.

a defendant to elect, in the first instance, whether his jury hear specific references to refused tests. When a citizen decides to pay the price that the law requires of him to exercise his right not to have evidence he was compelled to furnish used against him at trial, M.G.L. c. 90, § 24(f)(1) (180-day license suspension), that decision should not be disturbed by a judicial instruction about the very evidence he refused to furnish, at least until there is a question from the jury regarding such evidence.

b. The Court Deviated from Downs Erroneously

The Downs instruction here mentioned "breath test[s], blood test[s and] field sobriety test[s]." T.166. By referring specifically to three tests, the court heightened the likelihood that the jury were told of at least one test that, absent the Downs instruction, they would not have considered.

The court then immediately followed its Downs instruction with repeated references to Mr. Wolfe's "absolute right not to testify." T.166-67. A Downs instruction is reversible error if it refers to a decision not to submit to testing, so its proximity to repeated references to Mr. Wolfe's decision not to take the stand irreparably increased the risk that the jury

would infer that he had decided also not to submit to breathalyzer, blood, and field-sobriety testing, and would use that inference as a basis to convict him.

This is tantamount to an instruction that "a person does not have to take [a breathalyzer test]." Com. v. Gibson, 82 Mass. App. Ct. 834, 837 (2012) (reversing case for unpreserved Downs error). Moreover, the "Commonwealth's proof of impaired operation here was not strong." Id. Reversal should result because, "the error here is constitutional in nature, [] is one that our courts have deemed prejudicial to defendants," and "given the significance of the error and prejudice [there is] no reason why counsel would not have insisted on a correct instruction." Id.

c. The Prosecutor Relied on Facts not in Evidence to Bolster Weak Evidence of Impairment

The prosecutor twice referred to facts not in evidence during his closing argument that went to the weakest issue in the prosecution's case: impairment. First the prosecutor told the jury that "the odor of alcohol was so strong that when he was brought into the booking station, the booking station was filled with the odor of alcohol." T.149. Then he stated that

[Mr. Wolfe] was having difficulty even dialing a phone. In fact, he couldn't even use his own cell

phone. And this was not because of the cell phone signal issue. He just sat there and he was looking at his phone. He didn't even know how to turn it on, and he just looked at it.

T.150. These comments have no evidentiary support.

Regarding the odor of alcohol, neither of the officers testified that it "filled" the booking station. Instead, the arresting officer testified to the odor at the scene, T.57, and the booking officer initially seemed confused by the question ("Odor?"). T.62. The booking officer then stated that he noticed the odor of alcohol, but not that it filled the station. T.63.

Regarding Mr. Wolfe's cell phone, the evidence was that there were often signal issues because of the station's construction, and that Mr. Wolfe's phone would not turn on. T.65. There was no evidence that Mr. Wolfe did not know how to turn his phone on, and there was evidence contradicting the prosecutor's assertion that Mr. Wolfe's phone difficulties were not due to a cell phone signal issue.

[For closing-argument errors, the Court] considers (1) whether the defendant seasonably objected; (2) whether the error was limited to collateral issues or went to the heart of the case; (3) what specific or general instructions the judge gave the jury which may have mitigated the mistake; and (4) whether the error, in the circumstances, possibly made a difference in the jury's conclusions.

Com. v. Arroyo, 442 Mass. 135, 147 (2004)(quotation omitted). Here, while there was no objection, the other three factors bode heavily in Mr. Wolfe's favor.

These comments went to the central issue of impairment. Evidence that a person's entrance into a police station filled the station with the odor of alcohol, and that a person did not know how to turn on his cell phone, tends convincingly to prove impairment. Also, there were no specific curative instructions.

The prejudiced caused by these comments shows that they "possibly made a difference in the jury's conclusions." Arroyo, 442 Mass. 147. The impairment evidence was weak and, while the officers testified to typical indicia of drinking, there was little evidence that drinking had any effect on Mr. Wolfe's driving.

The only evidence of impaired driving was crossing the yellow line to avoid encroaching snow banks, and this is equally if not more likely to have been an instance of responsibly avoiding a dangerous road obstacle as it is to have been impaired driving. Cf. Commonwealth v. O'Brien, 305 Mass. 393, 400 (1940) ("When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof.").

The arresting office was forced to admit that what first drew his attention to Mr. Wolfe was a broken taillight, not anything about his driving. T.70. When he followed Mr. Wolfe, he saw him appropriately use his turn signal, deviate from his lane only to avoid encroaching snow banks, and remain within the speed limit. Of particular note, Mr. Wolfe's driving was so safe that the officer opted to allow him to continue driving on a winding road for a mile late at night before pulling him over.

Once he was pulled over, Mr. Wolfe exhibited appropriate seriousness, honestly answered questions about where he had been and what he had been doing, and retrieved the requested paperwork with dispatch. He remained calm and alert during the ride to the station and, at around 3 AM, slept briefly at the station. While this evidence provides sound bases on which reasonably to doubt Mr. Wolfe's guilt, the jurors may have been swayed to improperly suppress that doubt by the prosecutor's assertions that Mr. Wolfe smelled so strongly of alcohol, and could not turn on his phone.

Exacerbating this prejudice, the prosecutor distracted the jury from the dearth of impairment evidence by framing his case, not in terms of

impairment, but instead in terms of drinking in itself. The prosecutor did not even mention impairment in his brief opening, and instead mentioned only drinking, and getting behind the wheel. T.46 ("On the night of February 13th, 2015 he made a choice. He made the choice to drink and get behind a wheel. That led to arrest of him for OUI and now he's sitting here today."). This obscured the fact that impairment, not drinking and driving, must be proven. Gibson, 82 Mass. App. Ct. 837.

"A substantial likelihood of a miscarriage of justice exists unless we are substantially confident that, if the error had not been made, the jury verdict would have been the same." Arroyo, 442 Mass. 147-48. Whereas there was "evidence supporting Arroyo's guilt, including his statements before and after the crimes and the evidence linking him to the jacket worn by the assailant," id., the officer in this case followed Mr. Wolfe and observed little evidence of impairment. The prosecutor's remarks may very well have had an impact.⁴

VI. Statement of Reasons For Direct Appellate Review

Direct Appellate Review should be granted because the instant case presents questions of law concerning

⁴ See also supra n. 3.

the Constitution of the Commonwealth and questions of such public interest that justice requires a final determination by the full Supreme Judicial Court.

The constitutional question presented by this case is whether art. 12's guarantee that a person will not be convicted on evidence they were compelled to furnish is violated by a judge's repeated references to the very evidence that the law compels. The Massachusetts Constitution differs from its federal counterpart with regard to refusal evidence and, especially in the current jurisprudential atmosphere, it is important to reaffirm the extent of constitutional protections afforded to the citizens of this Commonwealth.

This is a matter of public interest because Massachusetts citizens regularly elect to subject themselves to the punishment of license suspension in order to give effect to their right not to have evidence that they were compelled to furnish used against them. Giving full effect to that right requires also that those who have refused to furnish such evidence be able to elect, in the first instance, whether their jury will ever hear anything about the tests they refused to submit to. Where a case involves references to all three popular types of testing (breath, blood, field

sobriety), and a person who submitted to no testing at all, it presents a compelling occasion to revisit Downs.

Finally, this question requires a final determination by the full Supreme Judicial Court because the Appeals Court has recently been asked to revisit Downs, and it declined to do so. See Com. v. Medeiros, 87 Mass. App. Ct. 1138 , 2015 WL 4579317, at *2 (2015)(1:28 disposition), review den'd, 473 Mass. 1102.

VII. Conclusion

For the above-stated reasons, the court should grant direct appellate review, and reverse the Trial Court's judgments on Mr. Wolfe's convictions.

Respectfully submitted,
The Defendant-Appellant,
By his attorneys,
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VIII. Addendum

Certified Copy of Docket Entries.....	Add.1
Criminal Docket.....	Add.3
Motion <i>In Limine</i> To Preclude Introduction Of Attempted Portable Breathalyzer Test (with Margin Order indicating Allowance).....	Add.5
Motion To Exclude Refusal Evidence Regarding Field Sobriety Tests And Breath Test with Margin Order indicating Allowance).....	Add.7
Jury Questions from January 6-7, 2016 Mistrial...	Add.9
Certificate of Service.....	Add.11

CRIMINAL DOCKET DOCKET ENTRIES		DEFENDANT NAME Michael J Wolfe	DOCKET NUMBER 1521CR000174
DATE	DOCKET ENTRIES		
1/5/16	MOTION TO EXCLUDE REFUSAL EVIDENCE REGARDING		
	FIELD SOBRIETY TESTS & BREATH TEST - ALLOWED - NOONAN, M.		
1/6/16	COMMON'S MOTION IN LIMINE TO ADMIT EVIDENCE OF THE		
	DEFT'S ATTEMPTED FIELD SOBRIETY TEST - ALLOWED IN PART		
1/6/16	COMMON'S MOTION IN LIMINE TO INT. IN-COURT ID		
	AT TRIAL - ALLOWED BY AGREEMENT NOONAN, M.		
1/7/16	JURORS' QUESTIONS		
1/6/16	MOTION IN LIMINE TO PRECLUDE INTRO. OF ATTEMPTED		
	PORTABLE BREATHALYZER TEST FILED		
1/6/16	MOTION FOR INDIVIDUAL VOIR DIRE OF PROSP. JURORS FILED		
1/6/16	MOTION TO SEQUESTER WITNESSES - ALLOWED NOONAN, M.		
1/6/16	WITNESS LIST FILED		
3/29/16	2ND TRIAL		
3/29/16	LIST OF EXHIBITS FILED		
3/29/16	JURORS SELECTED AND RENDERING VERDICT FILED		
3/29/16	MOTION IN LIMINE TO PRECLUDE INTRO OF ATTEMPTED		
	PORTABLE BREATHALYZER TEST - ALLOWED - FABBRE, M.		
3/29/16	MOTION TO EXCLUDE REFUSAL EVIDENCE REGARDING		
	FIELD SOBRIETY TESTS & BREATH TEST - ALLOWED - FABBRE, M.		
3/29/16	MOTION FOR INDIVIDUAL VOIR DIRE OF PROSPECTIVE JURORS - filed		
3/29/16	MOTION FOR REQUIRED FINDING OF NOT GUILTY - DENIED - FABBRE, M.		
3/29/16	VERDICT SLIP - GUILTY		
3/29/16	WITNESS LIST		
3/29/16	MOTION TO SEQUESTER WITNESSES - ALLOWED FABBRE, M.		
	<div style="border: 1px solid black; padding: 5px; text-align: center;"> A TRUE COPY, ATTEST <i>Paul F. Malley</i> CLERK-MAGISTRATE </div>		

APPROVED ABBREVIATIONS

ARR = Arraignment PT = Pretrial hearing CE = Discovery compliance & jury selection T = Bench trial JT = Jury trial PC = Probable cause hearing M = Motion hearing SR = Status review

SRP = Status review of payments FA = First appearance in jury session S = Sentencing CW = Continuance-without-finding scheduled to terminate P = Probation scheduled to terminate

DFTA = Defendant failed to appear & was defaulted WAR = Warrant Issued WARD = Default warrant issued WR = Warrant or default warrant recalled PR = probation revocation hearing

CRIMINAL DOCKET		DOCKET NUMBER 1521CR000174		NO. OF COUNTS 3	Trial Court of Massachusetts District Court Department		
DEFENDANT NAME AND ADDRESS Michael J Wolfe 125 Forest Avenue Hudson, MA 01749			DOB 09/25/1989	GENDER Male	COURT NAME & ADDRESS Marlborough District Court 45 Williams Street Marlborough, MA 01752		
			DATE COMPLAINT ISSUED 02/13/2015				
			PRECOMPLAINT ARREST DATE 02/13/2015		INTERPRETER REQUIRED		
FIRST FIVE OFFENSE COUNTS							
COUNT	CODE	OFFENSE DESCRIPTION				OFFENSE DATE	
1	90/24/J	OUI-LIQUOR OR .08% c90 §24(1)(a)(1)				02/13/2015	
2	89/4A	MARKED LANES VIOLATION * c89 §4A				02/13/2015	
3	90/7/D	EQUIPMENT VIOLATION, MISCELLANEOUS MV * c90 §7				02/13/2015	
DEFENSE ATTORNEY <i>Kristen Wheeler</i>			OFFENSE CITY/TOWN Marlborough		POLICE DEPARTMENT Marlborough PD		
DATE & JUDGE		DOCKET ENTRY		DATE & JUDGE		FEES IMPOSED	
<i>2-13-15 Stark</i>		<input checked="" type="checkbox"/> Attorney appointed (SJC R. 3:10) <input type="checkbox"/> Ally denied & Delt. Advised per 211 D §2A <input type="checkbox"/> Waiver of Counsel found after colloquy Terms of release set: <input checked="" type="checkbox"/> PR <input type="checkbox"/> Bail <input type="checkbox"/> See Docket for special condition <input type="checkbox"/> Held (276 §58A)		<i>2-13-15</i>		Counsel Fee (211D § 2A(1)(2)) \$ <i>150</i> Paid <input type="checkbox"/> WAIVED	
						Counsel Contribution (211D § 2A(1)(3)) \$ <input type="checkbox"/> WAIVED	
				<i>7-3-15 Felt</i>		Default Warrant Fee (276 § 30(1)) \$ <i>30</i> <input type="checkbox"/> WAIVED	
						Default Warrant Arrest Fee (276 § 30(2)) \$ <input type="checkbox"/> WAIVED	
<i>2-13-15 Stark</i>		Arraigned and advised: <input checked="" type="checkbox"/> Potential of bail revocation (276 §58B) <input type="checkbox"/> Right to bail to review (276 §58) <input type="checkbox"/> Right to drug exam (111E § 10) <input type="checkbox"/> Inquiry made by Court under 276 § 56A Abuse Allegation: <input type="checkbox"/> C276 § 56A form filed by Commonwealth <input type="checkbox"/> Allegation of abuse under C276 § 56A found <input type="checkbox"/> No allegation of abuse under C276 § 56A found		<i>3-29-16</i>		Probation Supervision Fee (276 § 87A) \$ <i>6.5 x 12</i> <input type="checkbox"/> WAIVED	
						Bail Order Forfeited	
						Advised of right to jury trial: <input type="checkbox"/> Waiver of jury found after colloquy <input type="checkbox"/> Does not waive	
						Advised of trial rights as pro se (Dist. Ct. Supp.R.4)	
				Advised of right of appeal to Appeals Ct. (M.R. Crim P.R. 28)			
SCHEDULING HISTORY							
NO.	SCHEDULED DATE	EVENT	RESULT		JUDGE	TAPE START/STOP	
1	02/13/2015	Arraignment	<input checked="" type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd		<i>Stark</i>		
2	<i>4-8-15</i>	<i>PTH</i>	<input checked="" type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
3	<i>5-19-15</i>	<i>DCE</i>	<input checked="" type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd		<i>Pollock</i>		
4	<i>9-1-15</i>	<i>JTR</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
5	<i>7-7-15</i>	<i>WARRANT/SEN</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
6	<i>6/15/15</i>	<i>BIF</i>	<input checked="" type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd		<i>PERDA</i>	<i>Felt</i>	
7	<i>9-29-15</i>	<i>JTR</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd				
8	<i>7-3-15</i>	<i>SRP</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd		<i>WARD</i>	<i>\$200 Cash Bail - Felt</i>	
9	<i>7-30-15</i>	<i>WR</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input type="checkbox"/> Cont'd		<i>Felt</i>		
10	<i>9-29-15</i>	<i>JTR</i>	<input type="checkbox"/> Held <input type="checkbox"/> Not Held but Event Resolved <input checked="" type="checkbox"/> Cont'd		<i>Felt</i>		
APPROVED ABBREVIATIONS							
ARR = Arraignment PTH = Pretrial hearing DCE = Discovery compliance & jury selection BTR = Bench trial JTR = Jury trial PCH = Probable cause hearing MOT = Motion hearing SRE = Status review SRP = Status review of payments FAT = First appearance in jury session SEN = Sentencing CWF = Continuance-without-finding scheduled to terminate PRO = Probation scheduled to terminate DFTA = Defendant failed to appear & was defaulted WAR = Warrant Issued WARD = Default warrant recalled PVH = probation revocation hearing							
A TRUE COPY ATTEST:		CLERK-MAGISTRATE / ASST CLERK			TOTAL NO. OF PAGES		ON (DATE)
		X A TRUE COPY, ATTEST <i>[Signature]</i> CLERK-MAGISTRATE					



CRIMINAL DOCKET - OFFENSES		DEFENDANT NAME Michael J Wolfe		DOCKET NUMBER 1521CR000174	
COUNT / OFFENSE 1 OUI-LIQUOR OR .08% c90 §24(1)(a)(1)		DISPOSITION DATE AND JUDGE 3-29-16 Febbr			
DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or <input type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and 278 §29D warning <input type="checkbox"/> Bench Trial <input checked="" type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)	FINE/ASSESSMENT	SURFINE	COSTS	OUI §24D FEE	OUI VICTIMS ASMT
	HEAD INJURY ASMT	RESTITUTION	V/W ASSESSMENT	BATTERER'S FEE	OTHER
		SENTENCE OR OTHER DISPOSITION <input type="checkbox"/> Sufficient facts found but continued without a finding until: <input checked="" type="checkbox"/> Defendant placed on probation until: 3-29-17 <i>24D Program 45 Day LCL</i> <input checked="" type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by: Last Drink - Speakers - Marlboro			
FINDING <input checked="" type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause	FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)				
COUNT / OFFENSE 2 MARKED LANES VIOLATION * c89 §4A		DISPOSITION DATE AND JUDGE 3-29-16 Febbr			
DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or <input type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and 278 §29D warning <input type="checkbox"/> Bench Trial <input type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input checked="" type="checkbox"/> Filed with Defendant's consent <i>until end of business today</i> <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)	FINE/ASSESSMENT	SURFINE	COSTS	OUI §24D FEE	OUI VICTIMS ASMT
	HEAD INJURY ASMT	RESTITUTION	V/W ASSESSMENT	BATTERER'S FEE	OTHER
		SENTENCE OR OTHER DISPOSITION <input type="checkbox"/> Sufficient facts found but continued without a finding until: <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by:			
FINDING <input checked="" type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause	FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)				
COUNT / OFFENSE 3 EQUIPMENT VIOLATION, MISCELLANEOUS MV * c90 §7		DISPOSITION DATE AND JUDGE 3-29-16 Febbr			
DISPOSITION METHOD <input type="checkbox"/> Guilty Plea or <input type="checkbox"/> Admission to Sufficient Facts accepted after colloquy and 278 §29D warning <input type="checkbox"/> Bench Trial <input type="checkbox"/> Jury Trial <input type="checkbox"/> Dismissed upon: <input type="checkbox"/> Request of Commonwealth <input type="checkbox"/> Request of Victim <input type="checkbox"/> Request of Defendant <input type="checkbox"/> Failure to prosecute <input type="checkbox"/> Other: <input type="checkbox"/> Filed with Defendant's consent <input type="checkbox"/> Nolle Prosequi <input type="checkbox"/> Decriminalized (277 §70 C)	FINE/ASSESSMENT	SURFINE	COSTS	OUI §24D FEE	OUI VICTIMS ASMT
	HEAD INJURY ASMT	RESTITUTION	V/W ASSESSMENT	BATTERER'S FEE	OTHER
		SENTENCE OR OTHER DISPOSITION <input type="checkbox"/> Sufficient facts found but continued without a finding until: <input type="checkbox"/> Defendant placed on probation until: <input type="checkbox"/> Risk/Need or OUI <input type="checkbox"/> Administrative Supervision <input type="checkbox"/> Defendant placed on pretrial probation (276 §87) until: <input type="checkbox"/> To be dismissed if court costs / restitution paid by:			
FINDING <input type="checkbox"/> Guilty <input type="checkbox"/> Not Guilty <input type="checkbox"/> Responsible <input checked="" type="checkbox"/> Not Responsible <input type="checkbox"/> Probable Cause <input type="checkbox"/> No Probable Cause	FINAL DISPOSITION <input type="checkbox"/> Dismissed on recommendation of Probation Dept. <input type="checkbox"/> Probation terminated: defendant discharged <input type="checkbox"/> Sentence or disposition revoked (see cont'd page)				



COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss:

DISTRICT COURT DEPARTMENT
MARLBOROUGH DIVISION
DOCKET NO. 1521CR174

COMMONWEALTH

v.

MICHAEL WOLFE

MOTION IN LIMINE TO PRECLUDE INTRODUCTION OF
ATTEMPTED PORTABLE BREATHALYZER TEST

The defendant, Michael Wolfe, is charged with operating a motor vehicle while under the influence of intoxicating liquor. He moves to preclude the commonwealth from introducing evidence of, or making reference to, the failed administration of the Portable Breathalyzer Test (PBT) to the defendant by the arresting officer.

As grounds for this motion, the defendant states:

1. The PBT test apparently has a scientific basis that is not within the common knowledge of a lay person; it therefore requires expert testimony. *See Commonwealth v. Sands*, 424 Mass. 184, 188 (1997).
2. The commonwealth cannot lay the proper foundation to demonstrate that the PBT field sobriety test is generally accepted in the scientific community as a reliable indicator of the correlation between the consumption of alcohol and the results of the PBT. *See id.* at 188-89.
3. The arresting officer is not qualified to testify as an expert witness as to the scientific basis, reliability and general acceptance of the PBT test in the scientific community. *See id.*
4. The PBT does not comply with the Code of Massachusetts regulations or the Massachusetts General Laws regarding the administration of breathalyzer tests in the commonwealth. *See* 501 C.M.R. 2.00-2.20; M.G.L. ch. 90, § 24K.
5. Although in this case, the commonwealth is not seeking to introduce the numerical results of the breathalyzer test, it is seeking to introduce observations made during the administration of the test, relating to the test, as well as the arresting officers' opinions about Mr. Wolfe's failure to follow directions.

3/29/16 -
ALLOWED -
FALLS

6. Because a PBT does not comply with the Code of Massachusetts regulations or the Massachusetts General Laws regarding the administration of breathalyzer tests, any evidence that would have been obtained through the administration of this test would have been inadmissible.
7. Where a breath test is not admissible in Court, the Appeals Court has noted that consent and refusal are irrelevant to the proceedings at hand. Commonwealth v. Curley, 78 Mass. App. Ct. 163, fn 12 (2010) (*quoting* Commonwealth v. Sabourin, 48 Mass. App. Ct. 505, 506, 722 N.E.2d 994, 995 (2000) (“In another context, this court has held that ‘[t]he consent to take the test impliedly contemplates the taking of a valid test (one that would be admissible in court).’”).
8. The commonwealth should not be allowed to benefit from highly prejudicial testimony regarding the administration of the breathalyzer test without making an initial showing that, if a sample had been produced, the test results would have been valid; i.e. admissible.

The defendant requests that the commonwealth be precluded from introducing evidence of or making reference to the administration of the PBT administered to the defendant by the arresting officer. This court should exclude all evidence and testimony regarding the breathalyzer test because any probative value that such evidence would have, which is simply cumulative to other observations regarding Mr. Wolfe’s ability to understand and follow directions, is far outweighed by the prejudice to the Defendant, and would ultimately deny Mr. Wolfe his right to due process, to a fair trial, to present a defense, and to effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article Twelve of the Massachusetts Declaration of Rights

Respectfully submitted,
MICHAEL WOLFE
By his attorney:



Kristen Wheeler
BBO #685854
Committee for Public Counsel Services
2 Bishop Street
Framingham, MA 01702
(508) 620-0351 – phone
(508) 620-0354 – fax

Dated: 3/29/16

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss:

DISTRICT COURT DEPARTMENT
MARLBOROUGH DIVISION
DOCKET NO. 1521CR174

COMMONWEALTH

v.

MICHAEL WOLFE

MOTION TO EXCLUDE REFUSAL EVIDENCE REGARDING
FIELD SOBRIETY TESTS AND BREATH TEST

Now comes the Defendant, Michael Wolfe, in the above-entitled action and moves that this Honorable Court exclude any reference(s) to defendant's refusal to submit to field sobriety tests and the chemical breath test, and additionally, any testimony or references to these tests as OUI detection methods in general. Mr. Wolfe was asked by Officer Richardson of the Marlborough Police Department to submit to field sobriety tests. In response, Mr. Wolfe stated he would not feel comfortable taking the tests, and declined to do so. After his arrest, when offered a chemical breath test at the Marlborough Police Station, Mr. Wolfe also declined to take this test, signing the consent form to that effect.

As grounds for this motion, the Defendant states that "[i]t is well settled in Massachusetts that a defendant's refusal to submit to a blood alcohol or field sobriety test is inadmissible at trial." *Commonwealth v. Healy*, 452 Mass. 510, 513 (2008) citing *Commonwealth v. Blais*, *supra* at 299-300; *Commonwealth v. Zevitas*, 418 Mass. 677, 683-684 (1994). Both the Appellate Court and the Supreme Judicial Court have held "the admissibility of such a refusal would place a defendant in a coercive 'Catch-22' situation: Take the test and 'furnish' incriminating real

3/29/16

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ALAN WOOD

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FILED

evidence against oneself, or refuse and produce adverse testimonial evidence of consciousness of guilt." *Commonwealth v. Brown*, 83 Mass. App. Ct. 772, 777 (2013) citing *Commonwealth v. Lopes*, 459 Mass. at 170, quoting from *Opinion of the Justices*, *supra* at 1211.

Therefore, the defendant requests that the commonwealth be precluded from introducing evidence of or making any reference to Mr. Wolfe's refusal to take either the field sobriety tests or the chemical breath test. Exclusion of any testimony or reference to these OUI detection methods in general, is further necessary given the implication that putting such information before the jury would have. If these standard detection methods are mentioned, it would lead the jury to speculate and come to the conclusion of refusal when they do not hear evidence regarding either. This court should exclude all evidence and testimony regarding the refusal and these tests as it would ultimately deny Mr. Wolfe his right to due process, to a fair trial, to present a defense, and to effective assistance of counsel under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article Twelve of the Massachusetts Declaration of Rights.

Respectfully submitted,
MICHAEL WOLFE
By his attorney:



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Framingham District Court Office
2 Bishop Street
Framingham, MA 01702
(508) 620-0351 – phone
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Dated: 3/29/16

MARLBOROUGH DISTRICT COURT

45 Williams Street
Marlborough, MA 01752
Tel: 508-485-3700 / Fax: 508-485-1575

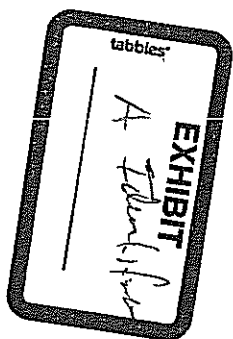
Michael Fabbri, Presiding Justice

Darryl S. Whitney, First Assistant Clerk Magistrate
Stephen P. LeDuc, Assistant Clerk Magistrate

Paul F. Malloy, Clerk Magistrate

JURY TRIAL

JURORS' QUESTION(S) TO THE COURT



COMMONWEALTH v. Michael J. Wolfe

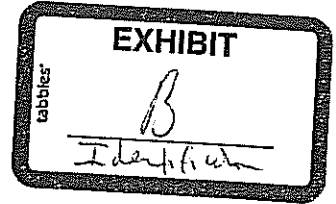
Commonwealth v. Michael J. Wolfe
PLAINTIFF DEFENDANT

~~Q1~~ ① Are we allowed to ask:
"Why were there no "tests" e.g.
Breathalyzer or blood test?"

DATE/TIME: 5:12pm 1/6/15

[Signature]
SIGNATURE OF FOREPERSON

MARLBOROUGH DISTRICT COURT
45 Williams Street
Marlborough, MA 01752
Tel: 508-485-3700 / Fax: 508-485-1575



Michael Fabbri, Presiding Justice

Darryl S. Whitney, First Assistant Clerk Magistrate
Stephen P. LeDuc, Assistant Clerk Magistrate

Paul F. Malloy, Clerk Magistrate

JURY TRIAL

JURORS' QUESTION(S) TO THE COURT

COMMONWEALTH v. Michael J. Wolfe

PLAINTIFF v. _____
DEFENDANT

We are split three-three on our
decisions, and in no way, shape, or
form be able to reach an unanimous
decision. What is your guidance for
us in this circumstance?

DATE/TIME: 11:04 1/7/16


SIGNATURE OF FOREPERSON

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

COMMONWEALTH OF MASSACHUSETTS)
 Appellee,)
V.) Appeals Ct. Docket No.: 2016P1372
))
MICHAEL WOLFE,)
 Defendant-Appellant.)

CERTIFICATE OF SERVICE

I, Luke Rosseel, KJC Law Firm, LLC, counsel for the Defendant-Appellant in the above-captioned action, this twenty-second Day of December, 2016, hereby certify, under penalties of perjury, that I served the Application for Direct Appellate Review and Motion for Leave to File Application for Direct Appellate Review Late with Supporting Affidavit of the Defendant-Appellant in the above-captioned matter on the following counsel of record by First Class Mail:

Thomas D. Ralph
Middlesex District Attorney's Office
15 Commonwealth Avenue
Woburn, MA 01801

_____/s/ Luke Rosseel_____
Luke Rosseel